Parity laws in Germany – Caving in to Gender Backlash or Consolidating Women's Citizenship Status?

Michaela Hailbronner 2020-07-18T09:00:00

This Wednesday, July 15, 2020 the Constitutional Court of Thuringia declared the parity law in Thuringia unconstitutional. The law had required political parties competing for elections to state parliaments to provide a zipper list system alternating between men and women with the aim to improve women's overall parliamentary representation. Soon the Constitutional Court of Brandenburg, another German state, will be deciding on a similar law. Much suggests that the matter will in time reach the German Constitutional Court.

Neither Brandenburg nor Thuringia are exceptions. Not in Germany where parity laws are discussed in other states and federally after the numbers of female representatives in parliaments have either decreased (as in the federal parliament) or remained stagnant at low levels over the last years (for the numbers in state parliaments see here). Nor elsewhere: according to data from the Inter-Parliamentary Union, as many as eighty-one countries now hold elections with legislated gender quotas. This fact itself should give us a pause to think. Whatever position we take, an increasing part of the world holds such quotas to be compatible with democracy, if not required by it.

In this contribution we examine the German developments in light of broader European debates. Though we believe that the German Basic Law can support stronger arguments for parity laws in representative political institutions, we do not need to make such stronger arguments here to defend the constitutionality of parity laws. For what is at stake is ultimately a question of legislative discretion: whether German legislatures are allowed to pass parity laws as a matter of state and federal constitutional law. Such legislative discretion is particularly appropriate where the constitutional text itself provides no clear standards, academic commentators disagree and where – as in this case – there exists a significant European trend towards adopting gender quotas with regional and international institutions repeatedly encouraging the adoption of such laws.

European Developments

In the European context, there have been several constitutional challenges against quota legislation, with diverse results. Some of them, especially those dating back to the 1990s, ended in the invalidation of such legislation giving way to processes of constitutional amendment under which the legislation was ultimately passed and women's underrepresentation legislatively addressed. This was for instance the case in France where, in 1982, the *Conseil Constitutionnel* struck down quota

legislation relying on a formal reading of the constitutional principle of equality, as well as on the notion of national sovereignty and, in connection to it, the indivisibility of the electoral body (Rodríguez-Ruiz and Rubio-Marín: 290-293). It was also the case in Italy in both 1993 and 1995 when the Italian Constitutional Court, at the time composed of only men, struck down mandatory quotas legislation underscoring the absolute value of the formal equality principle in the domain of politics, where notions of representation are also at stake.

In Spain, however, mandatory quota legislation was challenged but upheld by the Constitutional Court in 2008, on the basis of substantive equality in a reasoning that also foregrounds democratic considerations. For the Court, the legislative measure at stake (ensuring that there would be not more than a maximum of 40% / 60% disparity in the representation of both sexes in the candidates lists) did not discriminate against men because the rule was in fact gender neutral, with minimum and maximum proportions applying equally to women and men. Moreover, the Court reasoned, quotas were reasonable and proportionate with the aim pursued – that of making political equality effective for both sexes. In clear opposition to the ruling of the French *Conseil Constitutionnel*, the Spanish Court argued that quotas did not violate the unity of the electoral body because all candidates, when elected, and irrespective of their sex, are to represent the whole electorate during their mandate. Relying also on democratic legitimacy considerations, the Spanish court argued that since women constitute half the population, the increase of their presence in public office would help to ensure the 'closest identity between elected representatives and the represented.' The law validly limited the freedom of political parties – which, not unlike in Germany (Art. 21 GG), are accorded internal autonomy under the Spanish Constitution (Art. 6.2), subject only to an internal democratic functioning rule – not only because it was backed by a legitimate objective and a proportional measure but also because only citizens, not parties, are rights holders of passive and active suffrage rights.

The Spanish decision came years after the French and the Italian decisions and offered a constitutional interpretation, grounded on substantive equality, which made a constitutional amendment unnecessary. It also took place in a context in which several European countries, including Germany, had reformed their Constitutions to make the commitment to substantive gender equality explicit, thus signaling a new trend. Indeed, since the 1990s we observe a true wave of constitutional amendments to embrace women's substantive equality. Women had seen formal equality sanctioned in post-World War II constitutionalism in an increasing number of countries but had remained largely underrepresented in traditionally male domains, most likely as a legacy of the separate spheres tradition whose cultural heyday coincided precisely with the postwar years. In the 1990s there was a growing European consensus that this needed to change.

Some European countries inserted provisions compelling the state to actively take measures to ensure equality between men and women and to eliminate inequalities specifically to the detriment of women, without any specific mention to the concrete domains in which women were underrepresented (e.g. Germany's article 3.2; Greece's article 116.2; paragraph H of article 9º of the Portuguese constitution).

Other reforms introduced a clause either enabling or compelling the state or the legislature to take measures to promote equality or equal opportunities for women to stand for elections and to access electoral office (as in Slovenia and Portugal), or to advance equal access by women and men to elective mandates and public office (France and Italy). Now let us be clear. None of the other constitutional reforms set the basis for a subjective entitlement, allowing women to claim an enforceable right to equal representation. They simply legitimated or encouraged legislative intervention.

This emerging European consensus towards substantive equality and "parity democracy" (requiring an equal or gender balanced composition in representative and decision-making bodies) is expressed in the state practice of those European states which have adopted substantive equality and promotional gender equality provisions in their constitutions, as well as gender quota legislation in both the public and private governance sectors (with corporate legislation quotas now endorsed by several European states too). But it has also been fed by the actions and policies of European institutions. Characteristic of the European diffusion of gender quotas has been the foregrounding of democratic legitimacy considerations, when discussing gender quotas. In fact, the concept of parity was first discussed in 1989, in Europe, in the context of a seminar on *The democratic principle of equal representation*. Inspired by the emerging discourse on 'parity democracy', fourteen high-ranking female elected officials attending the first European Summit of Women in Power in November 1992 signed the Athens Declaration' supporting gender parity in legislative representation and state administration. This provided the context for the adoption of the *Council Recommendation on the balanced participation of women and men in decision-making* at the EU level in 1996, as well as the *Declaration on Equality between women and men as a fundamental criterion of democracy* at the Council of Europe, adopted in 1997. These instruments became a frame of reference for all those working in European Member States to increase the participation of women in decision-making, a goal which has remained high on the European agenda in the new century. Worth mentioning is also the Recommendation Rec (2003) 3 of the Committee of Ministers on the balanced participation of women and men in political and public decision-making.[1)]Adopted by the Committee of Ministers on 12 March 2003 at the 831 meeting of the Ministers' Deputies.

The link between women's political incorporation and the democratic credentials of a country, has also been underlined by the ECHR. In 2011, the ECHR defended Spain's parity law against claims of infringement of the rights to freedom of expression, assembly and association (Art. 10 and 11 of the ECHR), the state obligation to hold free elections (under Art. 3 of Prot. No. 1 to the Convention), and formal sex equality principles (under Art. 14 of the Convention and Art. 1 of Protocol no. 12).[2)]See *Méndez Pérez et Autres v. Espagne*, application no. 35473/08, Third Section decision of 4 October 2011 (inadmissible). See also *Statkundig Gereformeerde Partij v. the Netherlands,* application no. 58369/10, Third Section. Decision of 10 July 2012 (inadmissible). Most recently, in 2019, drawing on the explicit recommendation to adopt gender quotas to address the underrepresentation of women by the Parliamentary Assembly of the Council of Europe, the Court validated again mandatory quota legislation.

Indeed, the list of European countries that have adopted such form of parity legislation is not one easily ignored: It now includes Belgium, France, Greece, Italy, Poland, Portugal, Slovenia, Spain, Albania, Croatia, Bosnia and Herzegovina, Ireland, Moldavia, Montenegro, North Macedonia, Serbia and San Marino. Germany's absence in this list is in some ways surprising, especially if we consider that it is run by a female Chancellor, who will doubtlessly be remembered as one of the if not *the* most memorable political leader of her time. However, Germany occupies only position 47 in the global ranking on women in parliament by the IPU. That said, Germany has both historical and recent experience with affirmative action and gender quotas. Recently, it passed legislation enshrining gender quotas in the corporate sector. Germany was also among the first countries in Europe which, in the 1980s, saw the adoption of gender quotas of a voluntary kind by political parties, playing a protagonist role in pushing the ECJ and European law towards accepting affirmative action for women in the public employment sector (see e.g. the Kalanke case).

Germany

The German Constitutional Court has long had an admirable record in protecting women's rights, albeit with some exceptions. Preceding the introduction of Art. 3 para. 2 sentence 2, the court had embraced such a duty in its famous decision on night work where the Court argued that: "The sentence "Men and women shall have equal rights" is intended not only to eliminate legal norms which confer advantages or disadvantages based on sex, but also to implement equality between the sexes in the future [. . .]. It aims at creating equal conditions of life between the sexes. [. . .] Art. 3 para. 2 GG permits real-world disadvantages which typically afflict women to be compensated by regulations which favor women [. . .]" (transl. Vosskuhle&Bumke). There can thus be no doubt about its commitment to substantive understandings of equality. Neither the French, nor the Italian constitutions contained similar provisions when their courts struck down quota legislation forcing processes of constitutional amendment.

The question is, of course, how far this duty reaches – and what precisely this means for the political realm. Unsurprisingly, in Germany as elsewhere, different authors have put forward different conceptions of democracy and representation. It is worth noticing that the challenges to the parity laws are coming mainly from the right-wing and at least partly neo-Nazi *Alternative für Deutschland* (in Thuringia and Brandenburg), the NPD (in Brandenburg) and the male-dominated e-democracy-oriented Pirate Party (in Brandenburg) on the basis of broad and traditional notions of party autonomy and general representation which have allowed the political domain to remain a male preserve, under the lingering influence of the separate spheres tradition. For the AfD and the NPD, the maneuver fits into broader habits of calling on tradition to preserve, under the allure of the "traditional family", old gender roles which understand the public sphere to be primarily a male bastion of authority and power. As such, their attempts are part of the global backlash against womens' rights and, we believe, should be firmly opposed on the basis of women's equality.

To decide on the constitutionality of the parity laws, however, it is not necessary to decide what exactly Art. 3 para. 2 requires (in terms of state action) or select among different conceptions of representative democracy (where parity democracy might be said to require the adoption of quota legislation). Rather, the question regards the scope of legislative discretion and the role of constitutional courts vis-s-vis such legislative discretion. For what is at issue here is not a constitutional argument that parity is a constitutionally enforceable right, nor even that it is constitutionally required state action, but only whether legislatures themselves may force political parties to alternate between men and women on party lists to overcome the underrepresentation of women.

Ernst-Wolfgang Böckenförde, a former constitutional court judge and eminent constitutional scholar, once put forward the idea of the constitution as a mere framework, a *Rahmenordnung*. A frame determines the size of a painting but it does not tell us if the picture inside will be that of a whale or child, nor whether it is drawn in impressionist style or an abstract one. Conservatives like to quote Ernst Forsthoff who famously emphasized that the constitution should not become a "*Weltenei*" (a world egg) from which everything else flows. From this follows a restrained role for constitutional courts. If contemporary German conservatives take such arguments seriously, then the debate on legislative gender quotas represents a good opportunity to demonstrate their attachment to principle over the fact that they may or may not like the quota laws politically.

Of course, none of the arguments above – nor those of many other important voices such as Konrad Hesse who emphasized the functional limitations of constitutional review – implies that courts have no role to play. Ensuring that democracy works is part of protecting the framework. But this, and that is crucial, does not mean that the court should be the one to put forward a precise conception of democracy including all the details of electoral law and enforce this conception over the choice of democratically elected representatives (see also Christoph Möllers on this here). Rather, as the German constitutional court has emphasized in the past, the German Basic Law leaves it to the legislature to set out the details, which enjoys discretion in fulfilling that task (this includes notably key issues such as the choice between a first-past-the-post systems and proportional representation, to provide just one example). Thus, where they are overruling the decision of our democratically elected legislators, courts should be on firm constitutional ground and equipped with good arguments. In this instance, this is simply not the case.

Parity laws limit the freedom of political parties to put forward candidates of their own choosing, that much is clear. Whether they also touch on the individual right to run for office (the passive right to vote) or potentially even the (active) right to vote is more contested. Even if we assume this for the moment, however, parity laws limit these rights at most in a fairly minor way. And they do so in the service of the constitutional imperative to realize equality between men and women. (Note also that this imperative had even been specifically framed in terms of achieving substantive equality in *public life* in Thuringia's Constitution (Art. 2 para. 2).) Currently, men are overrepresented in German parliaments, both at the state and federal level and women are underrepresented relative to their equal

percentage in the population at large. German critics of parity laws often reject that conclusion on the basis that there are fewer women members in many political parties. However, existing research in the social sciences demonstrates quite clearly that the broader underrepresentation of women in politics is rooted in a host of structural reasons, ranging from different perceptions of men and women with respect to political leadership to the particular structures of different political parties (see e.g. here or briefly here, and more in this symposium). Given these structural obstacles to women's participation in politics, the claim by the AfD's lawyers and others (e.g. Morlok&Hobusch) that women are not in fact under- but overrepresented in political bodies given the lower percentage of female party members in a range of political parties simply misses the point: political parties are part of the problematic gatekeepers that are impeding women's equal citizenship. It also betrays an awkward understanding of the constitutional role of members of parliament who after all do not represent their party members but the German people more broadly. Deciding how to address these structural problems is a task that falls primarily to the legislature. Though some have argued that there may be other less restrictive means to encourage more participation of women in politics and thus ensure equal representation, political science studies make clear that quotas are at least one good way to bring in more female party members and thus to address the broader problem. Nor is there any apparent equally effective alternative. Political parties enjoy a sphere of constitutionally protected autonomy, which is already limited in many ways (e.g. minimum age, nationality requirements etc.). The legislator may well decide that pursuing the constitutionally enshrined goal of ensuring women's more equal representation is another valid reason to further limit such autonomy.

In light of all the above therefore, it is unconvincing to argue that legislatures are constitutionally prohibited to introduce parity laws. Given that the constitutional text does not provide clear standards either way, the Thuringia and Brandenburg laws represent at best cases where there are competing principles and rights at stake, the freedom of political parties and the duty to implement real equality between men and women. In this situation, it falls primarily to the legislature to strike a balance between them. That this excludes parity laws as one way to address the underrepresentation of women is not a plausible proposition in our opinion, given that other European countries and institutions clearly take the opposite view. European democracy is certainly not incompatible with parity requirements for representative bodies and some even argue that a renewed understanding of European democracy calls for them. Then again, the parties challenging parity laws are not known for looking outwards. The question is now whether German lawyers will join them on this.

References

- 1. Adopted by the Committee of Ministers on 12 March 2003 at the 831 meeting of the Ministers' Deputies.
- 2. See Méndez Pérez et Autres v. Espagne, application no. 35473/08, Third Section decision of 4 October 2011 (inadmissible). See also Statkundig Gereformeerde Partij v. the Netherlands, application no. 58369/10, Third Section. Decision of 10 July 2012 (inadmissible).